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## GP Autobat Sdn Bhd v Battery Solutions Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)-1913–10 OF 2016
HAMID SULTAN, BADARIAH SAHAMID AND MARY LIM JJCA
9 JULY 2018

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*Contract — Agreement — Breach — Parties entered into three contracts — Manufacture of grid panels for various models of batteries — Allegation that there was agreement to purchase firm monthly order of 250,000 panels — Purchaser purchased less — Whether firm order stipulated in contracts — Whether there was breach of contracts*

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The appellant was in the business of manufacturing automobile and industrial batteries while the respondent was a manufacturer of battery components. Vide three separate contracts, the respondent agreed to manufacture grid panels for various models of batteries for the appellant. Under these contracts, the appellant would provide the respondent with the moulds and the raw material for the manufacture of the grid panels. However, the respondent was expected to pay for the antimony lead from the appellant. In consideration, the respondent would be paid for a predetermined 'conversion cost' which was added to the cost of the antimony lead. The conversion cost would be the respondent's payment for works done. Dispute ensued when the respondent alleged that under the three contracts, the appellant had agreed to purchase a firm monthly order of 250,000 panels of each of the models stipulated in those contracts. The respondent claimed that the appellant breached all three contracts by purchasing less than what was committed. The respondent's claim was for a declaration that the appellant was in breach and for loss of profits by virtue of such breaches. The High Court judge allowed the respondent's claim of RM1,213,989.93 together with interest and costs. This was the amount that the respondent would have made had the appellant fulfilled its promise to purchase 45,022,063 panels; the appellant only purchased 13,391,950 panels. Hence, the present appeal.

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**Held**, allowing appeal with costs:

(1) When the whole contract is read and construed, the meaning of a fixed amount of 250,000 panels per type of grid panel per month was not clearly or patently evident from the terms of cl 3 of the first contract. The figure 250,000 was not qualified by any term such as 'firm' or 'fixed' as claimed by the respondent. An examination of the contracts will attest to this. Both the second and third contracts contain substantially similar

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terms and conditions except in the types of grids ordered and the costs of materials and transport (see paras 38 & 40).

(2) From the purchase orders, delivery orders and invoices issued, it was quite evident that the contentions of the respondent were not borne out. The purchase orders, delivery orders and invoices show that the purchases were not necessarily for a fixed amount of 250,000 grid panels at any particular time of the appellant's placement of its order. These documents also show that the purchases were not necessarily placed on a monthly basis, calendar or otherwise. In fact, these were instances of two purchases in the same month. Furthermore, these deliveries were also not made within the time period stipulated in the purchase orders. The evidence revealed that the purchase orders were sometimes met over a course of a couple of months (see paras 45 & 47).

(3) Despite the patterns of purchase orders which did not necessarily accord with calendar months where the deliveries were also of like nature or pattern and where the amount delivered were also of like nature or pattern and where the amounts delivered did not necessarily match the orders, the parties never complained or raised any protest or objection. The respondent was paid for all grid panels supplied and the appellant had not taken issue with any short orders or supplies (see para 49).

(4) It was not the respondent's claim that the appellant failed to collect the grid panels that it had produced. All that the respondent did was to add up the total number of grid panels according to the type where there was a shortfall, multiply the resulting figure by the total number of months, less costs in order to arrive at its loss of profits. No other evidence was adduced to support this calculation or basis. This was wholly unsatisfactory and should never have been accepted by the HCJ (see para 61).

**[Bahasa Malaysia summary**

Perayu menjalankan perniagaan membuat bateri kereta dan perindustrian manakala responden adalah pengeluar komponen bateri. Melalui tiga kontrak berasingan, responden bersetuju mengilang panel grid untuk pelbagai model bateri untuk perayu. Bawah kontrak ini, perayu akan membekalkan responden acuan dan bahan mentah untuk pembuatan panel grid. Bagaimanapun, responden dijangka membayar 'antimony lead' dari perayu. Sebagai balasan, responden akan dibayar kos penukaran yang ditetapkan yang ditambah pada kos antimoni. Kos penukaran adalah bayaran responden untuk kerja yang dilakukan. Pertikaian berlaku apabila responden mendakwa bahawa bawah tiga kontrak, perayu bersetuju untuk membeli pesanan bulanan tetap sebanyak 250,000 panel bagi setiap model yang ditetapkan dalam kontrak tersebut. Responden mendakwa perayu melanggar ketiga-tiga kontrak dengan membeli kurang daripada yang sepatutnya. Tuntutan responden adalah untuk

perisytiharan bahawa perayu melanggar dan menyebabkan kehilangan keuntungan akibat pelanggaran tersebut. Hakim Mahkamah Tinggi membenarkan tuntutan responden sebanyak RM1,213,989.93 bersama-sama dengan faedah dan kos. Ini adalah jumlah yang akan dijana oleh responden jika perayu memenuhi janji untuk membeli 45,022,063 panel; perayu hanya membeli 13,391,950 panel. Oleh itu, rayuan ini.

**Diputuskan**, membenarkan rayuan dengan kos:

(1) Apabila keseluruhan kontrak dibaca dan ditafsir, pengertian jumlah tetap 250,000 panel bagi setiap panel grid sebulan tidak nyata atau jelas berdasarkan terma klausa 3 kontrak pertama. Jumlah 250,000 tidak layak berdasarkan apa-apa istilah seperti 'firma' atau 'tetap' seperti yang dihujahkan oleh responden. Pemeriksaan kontrak akan membuktikannya. Kedua-dua kontrak kedua dan ketiga mengandungi istilah dan syarat yang sangat serupa kecuali tentang jenis grid, kos bahan dan pengangkutan yang dipesan (lihat perenggan 38 & 40).

(2) Berdasarkan pesanan pembelian, pesanan penghantaran dan invois yang dikeluarkan, agak jelas bahawa hujah responden tidak tertampung. Pesanan pembelian, pesanan penghantaran dan invois menunjukkan pembelian tidak semestinya untuk jumlah tetap 250,000 panel grid pada bila-bila masa tertentu perayu membuat pesanan. Dokumen-dokumen ini juga menunjukkan bahawa pembelian tidak semestinya dibuat secara bulanan, berdasarkan kalendar atau sebaliknya. Malah, ini adalah contoh dua pembelian pada bulan yang sama. Selain itu, penghantaran ini juga tidak dibuat dalam tempoh masa yang ditetapkan dalam pesanan pembelian. Keterangan menunjukkan pesanan pembelian kadangkala dipenuhi dalam beberapa bulan (lihat perenggan 45 & 47).

(3) Walaupun corak pesanan pembelian yang tidak semestinya sesuai dengan bulan kalendar di mana penghantaran juga bersifat serupa atau corak dan di mana jumlah yang dihantar juga bersifat serupa atau corak dan di mana jumlah yang dihantar tidak semestinya sepadan dengan pesanan, pihak-pihak tidak pernah mengadu atau menimbulkan sebarang protes atau bantahan. Responden telah dibayar untuk semua panel grid yang dibekalkan dan perayu tidak mengambil isu dengan sebarang pesanan atau kekurangan bekalan (lihat perenggan 49).

(4) Bukanlah tuntutan responden bahawa perayu gagal mengumpulkan panel grid yang dihasilkannya. Apa yang dilakukan oleh responden adalah menambah jumlah panel grid mengikut jenis di mana terdapat kekurangan, mendarab angka yang diperoleh dengan jumlah bulan, mengurangkan kos untuk mencapai kerugian keuntungannya. Tiada keterangan lain yang dikemukakan untuk menyokong pengiraan atau asas ini. Ini tidak memuaskan dan tidak sepatutnya diterima oleh hakim Mahkamah Tinggi (lihat perenggan 61).]

**Notes**

For cases on breach, see 3(2) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 3477–3499.

**Cases referred to**

*Delta Enterprises Sdn Bhd & Ors v Asia Commercial Finance (M) Bhd & Anor* [2005] 3 MLJ 293, CA (refd)

*Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453, FC (refd)

*Glamour Green Sdn Bhd v Ambank & Ors & Another Appeal* [2006] MLJU 649; [2007] 3 CLJ 413, CA (refd)

*Investors Compensation Scheme Ltd v West Bromwich Building Society Investors Compensation Scheme Ltd v Hopkin & Sons (a firm) and others Alford v West Bromwich Building Society and others Armitage v West Bromwich Building Society and others* [1998] 1 All ER 98, HL (refd)

*Koh Siak Poo v Perkayuan OKS Sdn Bhd & Ors* [1989] 3 MLJ 164, SC (refd)

*Mulpha Pacific Sdn Bhd v Paramount Corp Bhd* [2003] 4 MLJ 357, CA (refd)

*Prenn v Simmonds* [1971] 1 WLR 1381, HL (refd)

*Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2001] 1 MLJ 324, CA (refd)

*Syarikat Binaan Utara Jaya (a firm) v Koperasi Serbaguna Sungai Glugor Bhd* [2009] 2 MLJ 546, CA (refd)

**Appeal from**: Civil Suit No 22NCVC-477 of 2015 (High Court, Kuala Lumpur)

*Gerald Samuel (Goik Kenzin with him) (Ramesh & Loo) for the appellant.*
*Harpal Singh Grewal (Harwinder Kaur a/p Harbhajan Singh and Nahvinah Selvaraj with him) (Ariffin, Yeo & Harpal) for the respondent.*

**Mary Lim JCA (delivering judgment of the court):**

**[1]** This is an appeal against the decision of the High Court wherein the respondent's claim for a declaratory order and damages for breach of contract was allowed.

**[2]** At the hearing of this appeal, we sought further submissions from both counsel on the matter of conduct of the appellant, particularly upon the receipt of the respondent's letter of demand, whether this was relevant to and had any impact on the consideration of the claim. The parties have since filed further written submissions on the same. This is our decision.

FACTUAL BACKGROUND

**[3]** The appellant is in the business of manufacturing automobile and industrial batteries whereas the respondent is a manufacturer of battery components. In 2009, the appellant decided to expand the range of automotive batteries that it manufactured to include SLA or 'sealed lead-acid' batteries. Because the materials used for production of the SLA batteries differed from those used for producing its existing automotive batteries, the appellant could not use the same production facilities to produce the grid panels for the SLA batteries unless it made some changes.

**[4]** The appellant converted part of its grid panel production facility from automotive grids to SLA battery grids and outsourced the rest of the production. This is where the respondent came in.

**[5]** Vide three separate contracts (14 September 2009, 26 March 2010 and 28 February 2011, contracts to be referred to as the 'first contract', 'second contract' and 'third contract' respectively), the respondent agreed to manufacture grid panels for various models of batteries for the appellant. Under these contracts, the appellant would provide the respondent with the moulds and the raw material ('antimony lead') for the manufacture of the grid panels. The respondent was however expected to pay for the antimony lead from the appellant.

**[6]** In consideration, the respondent would be paid a predetermined 'conversion cost' which is added to the cost of the antimony lead. The conversion cost effectively would be the respondent's payment for work done converting the raw material into grid panels.

**[7]** Under these three contracts, the appellant further agreed to issue purchase orders ('PO') stipulating the quantity and model of the grid panels to be manufactured. In return, the respondent would issue its own PO for the quantity of antimony lead required for the manufacture of the particular batch or type of grid panels under the appellant's PO. After the respondent had manufactured the grid panels ordered by the appellant, it would then issue delivery orders ('DO') as proof of delivery and compliance of the relevant PO. Thereafter, the respondent would invoice the appellant against the relevant PO and DO.

**[8]** The parties conducted themselves according to this arrangement from September 2009 to early 2011.

**[9]** By letter dated 31 December 2010, the respondent informed the appellant that the appellant had committed to purchasing a fixed number of

panels, to wit, 250,000 panels of the grid type specified in the first contract from 15 September 2009–28 February 2011, and that there was a shortfall of four million panels in the grid panels ordered by the appellant. The respondent requested the appellant to 'make good the shortfalls in due course'. Similarly worded letters were sent in respect of the second contract and the third contract vide letters dated 6 March 2011 and 30 December 2011 respectively. The appellant did not 'make good the shortfalls' whether in due course or at all.

**[10]** Meanwhile, vide another letter dated 22 June 2011, the respondent informed the appellant that it would be increasing the relevant conversion charges. The respondent claimed that following this letter, the appellant's refusal to purchase the requisite amounts as required under cl 3 of all three contracts amounted to a breach of each of those contracts.

**[11]** By notices of demand dated 12 May 2014 and 29 June 2015, the respondent alleged that under the three contracts, the appellant had agreed to purchase a firm monthly order of 250,000 panels of each of the models stipulated in those contracts. The respondent claimed that the appellant breached all three contracts by purchasing less than what was committed. The respondent's claim was for a declaration that the appellant was in breach and for loss of profits by virtue of such breaches.

**[12]** The appellant refuted the respondent's claims contending, inter alia, that the three contracts were void for uncertainty. Alternatively, the appellant contended that there was no commitment in the terms alleged by the respondent and thereby no breach; and further denied that it had agreed to pay in the event it did not order the fixed monthly quantities of the various types of grid panels. The appellant further pleaded that there was wavier and estoppel on the part of the respondent, and termination by conduct of both parties.

**[13]** The genuineness of the respondent's three letters requiring the appellant to 'make good the shortfalls in due course', was also challenged.

**[14]** The appellant counterclaimed for losses allegedly sustained as a result of the respondent's breach of contract in relation to purchases of antimony lead from the appellant. The counterclaim was abandoned at the commencement of trial, and it was accordingly dismissed by the learned judge.

## DECISION OF THE HIGH COURT

**[15]** The learned judge identified three issues for disposal:

(a) whether there was a contract between the parties;

(b) the construction of cl 3 of each of the three contracts; and

(c) whether the appellant was in breach of the three contracts. A

**[16]** On the first issue, the learned judge disagreed with the appellant, finding the existence of the three contracts a non-issue since it was already an agreed fact that there were these three contracts. What needed determination however, was the question of the validity of the three contracts. B

**[17]** The learned judge then proceeded to deal with the remaining two issues, finding the three contracts valid, and that the appellant was in breach of each of the three contracts when it did not meet its monthly commitment of purchasing fixed quantities of the different grid panels. The claim of the respondent was consequently allowed. C

**[18]** On the construction of the three contracts, the learned judge found the contracts clear with complete terms and conditions warranting thus a literal construction. The principal condition in each contract was the respondent's agreement to produce each month, 250,000 of each type of grid panel and the appellant's agreement to purchase all those grid panels produced by the respondent. D

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**[19]** Applying a literal interpretation of cl 3 of each of the three contracts, the learned judge found that the appellant had committed itself to a fixed monthly purchase of 250,000 grid panels of each of the types mentioned in the three contracts. The learned judge rejected the appellant's suggestion that cl 3 was intended as only estimates. F

**[20]** According to the learned judge, cl 3 must be read with cl 12 (cl 12 prohibits the respondent from producing and selling grid panels to others). Such a reading is just as it will ensure that the respondent will receive the best returns based on the conversion formula in each of the three contracts. G

**[21]** The construction suggested by the appellant was rejected as it would bring injustice to the respondent. On the one hand, the respondent would be producing 250,000 panels which the appellant was not on the other hand, obliged to purchase. The respondent would suffer losses because by virtue of cl 12, the respondent could not sell the unpurchased panels to third parties. H

**[22]** Consequently, the learned judge allowed the respondent's claim of RM1,213,989.93 together with interest and costs. This was the amount that the respondent would have made had the appellant fulfilled its promise to purchase 45,022,603 panels; instead the appellant only purchased 13,391,950 panels. I

A DECISION OF THE COURT OF APPEAL

**[23]** Having considered all the submissions, the records of appeal and the grounds of the learned judge's decision, we find that there are very compelling reasons to intervene. We find the decision reached by the learned judge, 'plainly wrong', the standard that must be met before any appellate court will intervene, as restated by the Federal Court in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453:

> ... It is now established that the principle on which an appellate court could interfere with findings of fact by the trial court is 'the plainly wrong test' principle; see the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 at p 10 per Steve Shim CJ (Sabah and Sarawak). More recently, this principle of appellate intervention was affirmed by the Federal Court in *UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2018] Supp MLJ 363; [2010] 9 CLJ 785 where it was held at p 375 (Supp MLJ); p 800 (CLJ):
>
> > It is well settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient j udicial appreciation of evidence (see *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41b; *Watt or Thomas v Thomas* [1947] AC 484; and *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1).

**[24]** We are of the further view that the learned judge had fallen into error in the application of the principles of construction of contracts, reaching a decision which was plainly wrong and unsustainable on the material evidence before the trial court. We say so for the following reasons.

**[25]** First, the principles of construction of contract; that it is a question of law. Where the contract is in writing, the court then determines the intention of the parties by construing the contract within the written terms, disallowing the introduction and aid of extrinsic evidence to determine that intention. When construing any contract, it must also be of the contract as a whole, and, as far as it is practicable, the court strives to give effect to every part of the contract — see *Mulpha Pacific Sdn Bhd v Paramount Corp Bhd* [2003] 4 MLJ 357.

**[26]** This examination of the whole contract should also be conducted before attempting to construe any individual part of the contract. This was opined by the Court of Appeal in the case of *Syarikat Binaan Utara Jaya (a firm) v Koperasi Serbaguna Sungai Glugor Bhd* [2009] 2 MLJ 546, where the Court of Appeal added that where the language in the contract is plain and clear, the court's function is to give effect to the contract; the court cannot override the

declared intention of the parties. See also *Koh Siak Poo v Perkayuan OKS Sdn Bhd & Ors* [1989] 3 MLJ 164; and *Delta Enterprises Sdn Bhd & Ors v Asia Commercial Finance (M) Bhd & Anor* [2005] 3 MLJ 293. A

**[27]** The above principles apply where the terms of the contract are clear. Where, however, the language is not clear or where there is doubt as to the meaning of the terms used, the court is always entitled to look at and take into consideration the background and surrounding circumstances of the contract. This view and approach of the House of Lords expressed in *Prenn v Simmonds* [1971] 1 WLR 1381, has been adopted and applied by our courts. See for instance this court's view expressed in *Glamour Green Sdn Bhd v Ambank & Ors & Another Appeal* [2006] MLJU 649; [2007] 3 CLJ 413, that in ascertaining the meaning to be ascribed to the terms and conditions found in any contract, the factual matrix including the conduct of the parties, is relevant and material. See also *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2001] 1 MLJ 324. B C D

**[28]** While evidence on previous or prior negotiations leading to the contract and the declarations of subjective intent are excluded and admissible only where the action is one for rectification of contracts, this is entirely different from ignoring context and factual matrix. When it comes to ascertaining the meaning of terms and conditions drawn up in the contractual document, the court is striving to determine the meaning the words 'would convey to a reasonable man and it is not the same thing as the meaning of its words'. The latter is one where the meaning is a matter of dictionaries and grammars while the meaning of the documents is what the parties using those words against the relevant background would reasonably have been understood to mean. Citing from the House of Lords in *Investors Compensation Scheme Ltd v West Bromwich Building Society Investors Compensation Scheme Ltd v Hopkin & Sons (a firm) and others Alford v West Bromwich Building Society and others Armitage v West Bromwich Building Society and others* [1998] 1 All ER 98, the Court of Appeal further explained: E F G

> The background may not merely enable the reasonable man to choose between the possible meanings of words which are unambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352). H

**[29]** Consequently, a literal reading of words or terms used in the contract is not appropriate where the terms and conditions are not crystal clear or plain. I

**[30]** Next, the application of the above principles to the pleaded case of the

respective parties. We are frequently reminded of this basic and fundamental rule of pleadings in civil litigation; that parties are bound by their pleaded case. In this regard, we find scant attention given to the pleaded case resulting in a misapprehension of what the contracts and the claim are all about.

**[31]** The pleaded case of the respondent can be found at paras 4–6 of the statement of claim — that by the three respective contracts, the appellant had contracted and agreed to purchase certain monthly quantities of certain grid panels totaling certain volumes and that these contracts were from certain periods. The respondent attached three annexures to the statement of claim. These annexures contain summarised details of the orders placed by the appellant pursuant to the three contracts as well as summaries of the respondent's claim for loss of profits.

**[32]** In the case of the first contract, it was from 15 September 2009–28 February 2009, the second contract was from 1 March 2010–28 February 2011 and the third contract was from 1 September 2010–11 August 2014. The claim is that the appellant is in breach of the three contracts when it failed to make good shortfalls in its purchases, despite the respondent's reminders or notifications to make good the shortfalls. The reminders or notices were sent between 2011–2013.

**[33]** In defence, the appellant contended that these contracts were really in effect invitations to treat and that the purchases were conditional upon, inter alia, purchases of antimony lead from the appellant which obligation the respondent failed to keep; that the provision of 250,000 panels was only as an estimate and not an agreement to a minimum or maximum purchase; that the principles of waiver, estoppel and termination by conduct operated against the respondent; and that the notices or letters requiring the appellant to make good the shortfall were never received.

**[34]** In reply to this defence, the respondent, inter alia, denied that it was committed to purchasing the antimony lead from the appellant; that it was because of the appellant's breach in not placing the necessary orders that it could not proceed to purchase the antimony lead from the appellant; that the allegations of waiver, estoppel and termination by conduct are afterthoughts.

**[35]** When determining any claim, a trial judge must always take the defence into consideration, what the defence has to say about any particular plea. The learned judge is then required to evaluate the evidence led by all parties involved, with a view to deciding whether a plea, issue or contention is maintainable or sustainable on admissible and credible evidence, on a civil

balance of probabilities. We do not find any display or manifestations of that exercise, leaving us with serious concerns on the correctness of the decision and whether the learned judge had properly applied his mind to the claim or dispute before him.

**[36]** At the trial, the respondent relied on the three annexures as evidence of its claim and its losses. This is evident from the witness statement of PW1, a business consultant who testified on the respondent's behalf. His testimony is almost identical to that of PW2, a director of the respondent.

**[37]** We cannot see how the annexures to the statement of claim can be treated as proof of the respondent's claim that the appellant has agreed to a fixed monthly purchase of the relevant grid panels. These annexures are not contemporaneous documentary evidence of the claim. That can only come in the form of the purchase orders, the delivery orders, invoices and payments made.

**[38]** Contrary to the view of the learned judge, we do not find cl 3 clear and plain, carrying the meaning that the respondent claims. Certainly, when the whole contract is read and construed, and this will hold true for all three contracts since they are prepared on the same format, the meaning of a fixed amount of 250,000 panels per type of grid panel per month is not clearly or patently evident from the terms of cl 3. The figure '250,000' is not qualified by any term such as 'firm' or 'fixed' as claimed by the respondent. An examination of the contracts will attest to this.

**[39]** These are the relevant terms of the first contract:

> Re: Grid sub-contract to Battery Solutions Agreement
>
> We're pleased to confirm that GP will sub-con our grid casting for below sizes to Battery Solutions on the following terms and conditions:
>
> 1. Grid Type
>
> — EX1.2 Weight: 76+/-2(g)/panel Thickness: 1.2+/-0.1 (mm)
>
> — FL1.2 Weight: 110+/-2(g)/panel Thickness: 1.2+/-0.1 (mm)
>
> 2. Pricing
>
> 2.1 Conversion cost (A)
>
> — EX1.2 — RM0.055/panel
>
> — FL1.2 — RM0.055/panel
>
> 2.2 Material cost (B)

— EX1.2 — 110g/panel x 2.5% dross = 112.8g/panel

— FL1.2 — 76g/panel x 2.5% dross = 77.9g/panel

Note: 2.5% Antimony Lead cost as per item 4

Total cost = A + B / panel

3. *Purchase Order*

— *250,000 panels / order / sizes / month*

4. 2.5% Antimony Lead

Battery Solutions will purchase the 2.5% Antimony Lead from GP and pay the 2.5% Antimony Lead cost to GP based on monthly grids delivered quantity.

2.5% Antimony Lead cost = Previous month *LME average + Premium of USD 150/M Ton

Note: Exchange rate based on RM3.5 to USD1.00

5. Moulds & racks

— To be provided by GP

6. Transportation cost

— GP will bear the cost of delivery of Lead to Battery Solutions.

— Battery Solutions will bear the cost of all delivery to GP.

7. Stacking

— All grids shall be stacked at 50 panels/stack with a piece of plywood on every layer on rack.

8. Identification & labelling

— Every stack must be marked with green color on frame for identification and traceability.

— All racks must be tagged with type, casted date, quantity and QA Pre Delivery Inspection status.

9. Delivery

— All grids shall be aged at BS for minimum 5 days and inspected prior to delivery to GP.

10. Inspection

— GP will only verify the quantity & weight upon receiving.

— Quality inspection will be conducted before pasting. Any non-compliance shall be returned to BS at BS's cost not more than 2 months from date of receipt.

11. Quality claims

— Battery Solutions is responsible for the quality of the grids due to defects such as unfilled wires/frames, flashes on lugs/frames/wires, broken frames/lugs/wires and distortion.

GP will debit Battery Solutions for the defective grids on monthly basis as per item 2 pricing.

12. Payment

Month end + 30 days.

13. *Others*

— *Recycled lead is not allowed to use except rejected grids and gate heads during casting of GP grids.*

— *These moulds are the property of GP and BS is not allowed to cast any grids for 3rd parties without the prior consent from GP.*

(*LME stands for London Metal Exchange; the cost of lead was based on the prevailing LME average price) (Emphasis added.)

**[40]** Both the second contract and the third contract contain substantially similar terms and conditions except in the types of grids ordered, and the cost of materials and transport.

**[41]** According to the learned judge, after considering the evidence and submissions, cl 3, which states: '3. Purchase Order — 250,000 panels/order/sizes/month' is clear and must thus be given a literal meaning. Under cl 3, it literally means that the appellant is committed to a firm monthly order of 250,000 grid panels of each of type of grid — 'defendant terikat untuk memesan 250,000 'grid panel' bagi setiap jenis pada setiap bulan'. The amount of 250,000 panels refers to the firm or fixed monthly commitment of each type of grid panel and not to the total amount to be ordered.

**[42]** This means that since the first contract is for grid panels EX1.2 and FL1.2 of the weight and thickness specified therein, the appellant is firmly committed to a monthly purchase of 250,000 panels of each of those types. Each month, the appellant is required to purchase a total of 500,000 panels. Under the second contract, types XW1.2 and XW1.4 were added on whilst under the third contract, types EX1.2, XW1.2 and XW1.4 were again added. It was the respondent's case that under these three contracts, the appellant was committed to a total of 45,022,603 panels. Since the appellant purchased only 13,391,950 panels, there was a shortfall of 31,630,653 panels; leaving the appellant therefore in breach of the three contracts.

**[43]** While the respondent is entitled to its construction of cl 3, there must be evidence that it met those terms too. Its conduct and execution of cl 3 and

A the rest of the terms of the three contracts must be consonant and consistent with the construction that the respondent wanted the court to give. The learned judge agreed with the construction claimed by the respondent.

B **[44]** With respect, we cannot find the conclusions reached by the learned judge supported by the evidence before the court.

C **[45]** From the purchase orders, delivery orders and invoices issued, the latter being documents generated by the respondent, and these are the correct evidence upon which the trial court must determine the claim instead of the annexures relied on by the respondent's witnesses, it is quite evident that the contentions of the respondent are not borne out. The purchase orders, delivery orders and invoices show that the purchases were not necessarily for a fixed amount of 250,000 grid panels at any particular time of the appellant's D placement of its order. These documents also show that the purchases were not necessarily placed on a monthly basis, calendar or otherwise. In fact, there were instances of two purchases in the same month.

E **[46]** Then, there are the delivery orders prepared by the respondent themselves. These delivery orders were never made against the purchase orders in that even where the appellant ordered 250,000 grid panels, the respondent frequently did not deliver that amount. There are records of deliveries of amounts which either exceeded or were less than the amounts ordered. Based on the respondent's case, the respondent would have casted over 45 million F grid panels of different specifications. The evidence, however, revealed that the respondent only casted and delivered 4,506,300 grid panels. And, this is despite the appellant having ordered 6,377,700 grid panels. Yet, the respondent claimed that there was a shortfall in the purchases by the appellant.

G **[47]** These deliveries were also not made within the time period stipulated in the purchase orders. The evidence reveal that purchase orders were met sometimes over a course of a couple of months. These material discrepancies too, went unexplained and unevaluated by the learned judge.

H **[48]** All these pieces of evidence are consistent with the appellant's case that cl 3 in all three contracts provides for an estimate and not an agreed term of a fixed quantity. The clause was to deal with the respondent's capacity to produce the number of panels required by the appellant; that the orders are not to I exceed 250,000 panels each time one is placed. Since the moulds for the grid panels were supplied by the appellant, it makes good sense that the appellant inquired with the respondent as to its capacity to produce the panels. The learned judge fell into error in not giving the appellant's explanation its due consideration.

**[49]** Despite these patterns of purchase orders which did not necessarily accord with calendar months where the deliveries were also of like nature or pattern and where the amounts delivered did not necessarily match the orders, the parties have never complained or raise any protest or objection, whether orally or in writing at the material time. Of particular interest is the fact that the respondent has been paid for all grid panels supplied, and the appellant has not taken issue with any short orders or supplies.

**[50]** The first time the respondent informed the appellant of the shortfall was at the 'end' of each contract — two letters dated 6 March 2011 respectively for the first and second contracts, and letters dated 30 December 2011, 31 December 2012 and 5 June 2013 for the third contract. All these letters referred to as the 'impugned letters' were challenged as afterthoughts, concocted or fabricated to support the respondent's claim.

**[51]** The appellant had denied receipt of any of the letters and it had put the respondent to proof. The appellant had also challenged the genuineness of these letters as unlike other correspondence between the parties, these letters were signed by PW1 instead of PW2, sent by ordinary mail, and not addressed to particular persons within the appellant. The ordinary course of dealings between the parties showed that all correspondence between the parties were handled by PW2 and always sent to particular persons within the appellant's establishment. The explanation offered by the respondent was that PW2, who usually signed the letters to the appellant was on leave. The appellant had challenged the timely coincidence of all five occasions when the five impugned letters were signed, that it was highly suspicious given the lack of any documentary evidence of posting of the impugned letters, that a physical examination of the impugned letters raised further concerns in that the signatures were 'executed on the same spot and same ink colour giving the impression and suspicion that all six impugned letters were concocted and signed at the same time and not at five separate occasions during a period of three years as the respondent wanted the court to believe'.

**[52]** In addition, there was the matter of the correction to PW2's witness statement on the matter, to deal with an inconsistency of testimony that arose after PW1 had testified. In her original witness statement, PW2 had said that she had signed the impugned letters but after PW1 had testified that it was he who signed the letters, PW2 had amended her witness statement to say that she had authorised PW1 to sign.

**[53]** We have had a look at these letters and the grounds of challenge. We find the contentions of the appellant have obvious merit. In fact, one of those letters was even dated on a Sunday (4 March 2011). The appellant's bases for challenge and suspicion are founded especially when a subsequent letter of

demand dated 12 May 2014 sent according to the modus operandi between the parties was duly acknowledged.

**[54]** The matter of the genuineness of the impugned letters is entirely relevant to the respondent's claim and the matter of termination by conduct. Without these impugned letters, the first time the respondent raised any complaint on the shortfall would have been in 2014, long after the parties had gone their separate ways without issue, thus giving greater weight to the appellant's defence including that of waiver and estoppel while at the same time, undermine the respondent's claim.

**[55]** Unfortunately, this material issue was not dealt with by the learned judge. This is a further ground for the exercise of our powers of appellate intervention.

**[56]** From the terms of the three contracts, we further find that the learned judge had erred in finding that the respondent's claim was proved. As was pointed out earlier, the pleaded case is that the three contracts were for various periods. And, it is based on these periods that the respondent was then able to compute its loss of profits.

**[57]** However, a perusal of the three contracts will readily yield evidence that there is no fixed term, period or duration to any of the contracts. There is no mention or specification anywhere in any of the three contracts that for the first contract, it was from 15 September 2009–28 February 2009, the second contract was from 1 March 2010–28 February 2011 and the third contract was from 1 September 2010–11 August 2014. The contracts are silent as to the period of application or validity. Absent such an important term, there is no basis upon which the respondent could assert a claim for loss of profits for any of the periods claimed.

**[58]** We must add our views on the interplay of cll 3 and 12. The learned judge was of the view that cl 3 had to be examined with cl 12; that having read the two terms together, that because of the terms of cl 12, that the respondent's profits would be affected and that it could not mitigate its loss as it could not sell to third parties, it was only fair to conclude the appellant had committed itself to a fixed monthly purchase of 250,000 panels of each type of panel.

**[59]** We are of the respectful view that cl 12 is not capable of the construction given by the learned judge. Clause 12, if at all relevant, only deals with obtaining the prior written consent of the appellant to cast grids using the same moulds given by the appellant, for third parties. It does not prohibit the respondent from carrying on with its business of casting other grid panels of other specifications for third parties, or doing what it does which is a

manufacturer of battery components. Since the moulds supplied by the appellant have always belong to the appellant, and that the appellant were themselves doing their own panels but decided to outsource this task now to the respondent for the reasons explained by DW1, understandably their prior consent must be obtained before the respondent could cast for third parties. But, since there is no evidence that the respondent had already casted all 45 million over grids of various specifications but that these panels were not collected by the appellant, cl 12 does not apply.

**[60]** Insofar as damage is concerned, we cannot find any evidence to support the loss of profits claimed. In the first place, there was no production of the total number of grid panels; although the learned judge alluded to this at para 2 of the judgment:

> Defendan selanjutnya memberi komitment untuk membuat pesanan panel-panel bateri tersebut sebanyak 8,750,000 panel berbagai jenis di dalam kontrak pertama, 5,500,000 panel bateri berbagai jenis di dalam kontrak kedua dan 30,772,603 panel di dalam kontrak ketiga. *Jumlah keseluruhan tempahan ini dicapai oleh plaintif* di atas asas defendan akan membuat pesanan untuk 250,000 panel bateri bagi setiap jenis grid pada setiap bulan. (Emphasis added.)

**[61]** It is not the respondent's claim that the appellant failed to collect the grid panels that it had produced. All that the respondent did was to add up the total number of grid panels according to the type where there was a shortfall, multiply the resulting figure by the total number of months, less costs in order to arrive at its loss of profits. No other evidence was adduced to support this calculation or basis. We are of the view that this is wholly unsatisfactory and should never have been accepted by the learned judge.

**[62]** We further found that the learned judge had failed to take into consideration the material evidence that even with the orders made by the appellant, even accepting for a moment that the orders were short, which we do not find to be the case, the respondent actually had difficulties fulfilling those orders. The evidence showed that the appellant had ordered a total of 6,377,700 grid panels but the respondent had only delivered 4,506,300 panels. Even though there is no claim for short delivery by the appellant, this evidence is relevant in the consideration of the respondent's claim.

**[63]** For all the reasons explained, we must allow the appeal with costs subject to payment of allocator. Save for the decision on the counterclaim, the decision of the High Court is consequently set aside.

*Appeal allowed with costs.*

Reported by Afiq Mohamad Noor